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No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIE ALBERT SMITH,

Petitioner,

- against -

STATE OF MISSISSIPPI, Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

DAVID M. CORWIN
140 Henry Street
Brooklyn, New York 11201

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Where defense counsel is competent in some of the cross-examination of prosecution witnesses at a capital trial but is absolutely supine in the face of the prosecution's aggressive thrust at voir dire and in closing argument and fails to protect his client's interests at trial against the argumentative approach of the prosecution, may counsel be deemed to have rendered his client ineffective assistance?

2. Should the standard for counsel's ineffective assistance be the farce and mockery test or should that standard be uniformly replaced by the "reasonable competence" standard?

3. Where police enter a dwelling under exigent circumstances without a warrant and briefly spot evidence on the premises before leaving to try to find and save a crime victim, may they return after resolution of the emergency exigent circumstances and, still without a warrant, search for, identify and seize evidence?

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WILLIE ALBERT SMITH,

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-v.-

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi.

CITATION TO THE OPINION BELOW

The opinion of the Supreme Court of Mississippi, Smith v. State of Mississippi, 419 So.2d 563 (Miss., 1982) is set out in Appendix A, infra.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on August 11, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Mrs. Shirley Williams, a white store clerk at a convenience outlet in Jackson, Mississippi was seized outside the Tote-Sum store on Robinson Street in the early morning of March 15, 1981, according to two black males driving by or stopped -- their account was unclear -- in a car in the road. The person using force upon Mrs. Williams, according to the two male blacks, was a short-medium height black male. The two purported witnesses, one of whom was a strapping specimen, saw no weapon being used by the assailant but were too afraid to intervene. Instead they told a Jackson police officer later about the alleged incident. The police officer returned to the scene of the alleged abduction and searched the area.

Later the police spotted a red Pinto, which had been described as the assailant's car, and stopped it, seizing the occupant with what might most appropriately be referred to as a great deal of vigor. The soon-to-be defendant claimed that the officers dropped a shoe belonging to the assault victim in his car while the officers claimed to have found it there. Defendant willingly directed the officers to the address of the person, Edward Charles McDonald, from whom he had borrowed the car. The officers obtained defendant's address -- about which they never queried defendant -- from McDonald and drove there.

Allegedly deeply concerned for Mrs. Roberts' safety, the officers rushed into defendant's dwelling at 109 Keystone Court without a warrant. They briefly glanced at various clothing and effects of defendant in his bedroom and then left the dwelling to search the grounds where they found Mrs. Roberts' corpse. After satisfying themselves that Mrs. Roberts was beyond help, the officers, still without a warrant, returned

to defendant's home and continued to search for evidence that the defendant had been involved with the victim and for identification of him according to the description of the purported eyewitnesses.

Defendant's explanation of the circumstances was that he had stayed at a wedding party late into the morning and returned home somewhat intoxicated and then decided to take a package to the University Medical Center. A defective muffler on his car caused him to return home to make repairs where he was frightened by lights in his house and the shadow of a large male with an afro hair style. Defendant then fell asleep; awakening he drove once again down Robinson Road where the police picked him up.

It was pointed out at trial that the key alleged eyewitness to the abduction, one Thomas, had been unable to identify the defendant at a showup before the trial and had tentatively identified him from photographs the day before the trial. Thomas himself was in trouble with the criminal justice system and faced at the very least revocation of parole and perhaps even a long sentence. This problem may have caused him to make an identification at the behest of law enforcement officals, defense counsel stated at trial.

No fingerprint evidence was taken by the police although appropriate surfaces such as the plastic of the victim's credit cards were available. No plaster of Paris casts were taken of the shoe prints leading down the drag trial behind defendant's home leading to the ditch where the victim's body was found, although the prints had been undisturbed and were available for examination.

Furthermore, the defendant steadfastly maintained his innocence in the face of competent police interrogation and never confessed to any involvement with Mrs. Roberts. Thus the evidence against defendant was almost entirely circumstantial as the prosecution well recognized and pointed out at voir dire.

Ineffectiveness of Gregg as defense counsel was demonstrated by his supineness at voir dire, most obviously envinced by his telling the prospective jurors that he knew that the entire Jackson, Mississippi community was fed up with convenience store robberies and that he nevertheless hoped that each juror could maintain an objective attitude regarding his client's case (transcript 404-405).

Similarly, on voir dire, Mr. Gregg dwelt on what he described as the fear and stress involved in deciding a capital case and the problems facing prospective jurors in being exposed to gruesome kinds of evidence. Speaking to a combat veteran of Worl War II on the panel, defense counsel approached this problem almost from the prosecution's point of view with emphasis on the notion that the veteran was inured to seeing death and dying in violent contexts (transcript 428-436).

Further, Mr. Gregg asked prospective jurors whether the defendant's common law marital relationship would cause them any prejudice against his client, and he did the same with the defendant's drunkenness on the night he was supposed to have murdured Shirley Roberts (transcript 451-453). Here again, he seemed to be doing the prosecution's work for it.

Furthermore, in closing, which he was forced to do himself after trying to put on his son, a college student, Gregg stated, "Ladies and gentlemen, I certainly don't usually put titles on my efforts to address the jury but I put a title on this one. And that title is: Why me, dear God, why me? But when the mother of this young man appeared at my office with some members of his family and announced that they wanted to employ me to defend Willie Albert Smith who was charged with the murder -- the brutal murder that I had read about -- was in jail for the murder of a white woman, again I said: "Dear

God, why me?' On that particular day I thing (sic) if I could have found the back door I would have ran out but I would have had to go by them and that would be rude." (transcript, 1403).

While in our adversary system of justice, the give and take between evenly matched counsel might be likened to a cock fight, the kind of bear-baiting that occurs in a capital trial where the witness takes the stand and his counsel is so worried about his public image that he will not take aggressive measures to protect his client's interests is clearly impermissible, e.g.

A. I wasn't having no intention of running. Running for what? For you to bring me back up here and kill me?

Q. Is that what you want us to do?

A. What?

Q. That's the second time you have said we want to bring you back and kill you.

A. There ain't no telling what you want to do, you know.

Q. Is that what you want us to do?

A. No. (Transcript, 1308)

And further:

Q. You wanted the cop to kill you that morning. What's different about now?

A. I didn't want him to kill me.

Q. But you wouldn't fight him.

A. Say what?

Q. You wouldn't try to push him off.

A. What I'm gonna fight him for?

Q. You wouldn't even try to push him off.

A. What I want to fight him for? I couldn't push him.

Q. You answer the questions. You don't ask the questions. (Transcript, 1309)

Defense counsel's first objection to argumentativeness came considerably later in the trial (transcript, 1531).

The DA further discussed what had transpired in conference between counselor Gregg and defendant Willie Albert Smith regarding the length of sentence available for Smith if he took a guilty plea. The wide-ranging, aggressive inquiry of the DA should at the least have met with an objection as to attorney-client privilege, but there was none (transcript 1527-1528).

Moreover, the prosecution called the victim's daughter to the stand to identify exhibits (her mother's effects) which had been previously received, marked and identified into evidence. The main purpose of this exercise seemed to be the obtaining of the girl's breaking down on the stand. There was no objection as to lack of materiality by defense counsel (transcript, 1038).

Despite occasional objections to the prosecution's bringing in evidence of rape such as pubic hair found in bed-clothes and in the victim's pubic area (defendant's hair), the defense did not continuously and effectively object to such evidence regarding a crime not mentioned in the indictment. See testimony of technician Andrews, transcript 1112-1116.

Harassment of the defendant with repetitious and non-probative eliciting of details as to his apartment's layout and how he tossed his clothes off occurred without objection, transcript 1177-1182. Much more grossly overreaching was the prosecution's constant reference to the victim's breast area and her brassiere (which was introduced into evidence without any groundwork being laid for its probative value), see e.g. transcript 1192, query as to whether defendant pulled the victim's bra up. Finally, at transcript 1298, the DA asked rhetorically the defendant, "You don't know how her bra got pulled up either, do you?" and finally at transcript 1299, "Was she screaming while you were choking her, Mr. Smith?" All this transpired without objection as to inflammatoriness by the defense.

The defense was effective in pointing out that the defendant had never confessed under competent interrogation while incarcerated, that the positive eye-witness identification claimed by the prosecution was made from photographs the day before trial and not at the shop where the witness failed to identify Mr. Smith (counsel pointed out that one of the two purported eye-witnesses was facing revocation of bail and perhaps time in jail on another charge), and that no positive fingerprint identification had been made of defendant although proper surfaces such as that on victim's credit cards had been available, and plaster of Paris casts of footprints leading to the site where the victim's corpse had been dumped in a ditch had never been made or identified to defendant's shoes.

In regard to morale in taking on the prosecution in the admittedly difficult task of taking on the prosecution in an interracial murder, with rape of the victim constanly implied, however, defense counsel was sadly lacking, and his failure to press his case without regard to unpopularity or public opinion amounts to ineffectiveness in representation.

HOW THE FEDERAL QUESTIONS WERE RAISED AND PRESENTED BELOW

Appellate counsel for the defense petitioner in the Mississippi Supreme Court did not raise the question of trial counsel's competence. At 419 So.2nd 563, 574, the Mississippi Supreme Court stated, "At the trial the defendant was ably defended by astute counsel retained by his family."

The Fourth Amendment issue of search and seizure without a warrant, a procedure strictly circumscribed by the Chimel v. California, 395 U.S. 752 (1969), was raised both at trial and on appeal in the Mississippi Supreme Court, which found that the reentry of defendant's promises after the condition of exigent

circumstances (rescue of a crime victim) had expired was justified by a broad reading of Coolidge v. New Hampshire, 405 U.S. 443 (1971).

REASONS FOR GRANTING THE WRIT

In assessing an attorney's competence and his adequacy in rendering an accused reasonably effective assistance of counsel conscientious and diligent effort is the gravamen of the requirement, U.S. v. Bridgeman, 523 F.2d 1099 (CADC, 1975). Where a motion that might have been helpful is omitted by counsel, the issue probative of incompetency is whether the motion would have prevailed and whether such a victory would have turned around the result of the trial for the defendant, Gaines v. Hopper, 430 F. Supp. 1173 (MD Ga., 1977). While, generally, review of competency centers on adequacy of preparation of the case rather than a poor choice of trial strategies, Brubaker v. Dickson, 310 F.2d 30 (9th Cir., 1962), failure to raise an insanity defense at trial where it was the only effective defense available was held in U.S. ex rel. Lee v. Rowe, 446 F. Supp. 1039 at 1045 (ND Ill., 1978) to be evidence of incompetence or ineffectiveness. The basis for finding that the Lee counsel failed to pursue the best trial strategy was found in inadequate preparation of the case, but the Lee decision nevertheless does fault an attorney for a poor choice of tactics. Furthermore, where an attorney admits that his trial efforts resulted in being "sandbagged" by the prosecution and he fails in suppressing key evidence infirm from a Fourth Amendment point of view, failure to afford effective representation can be found, provided the error is not harmless, Moran v. Morris, 478 F. Supp. 145 (CD Cal., 1979).

The court made a finding of ineffective representation where counsel had no previous trial experience and had misrepresented his membership in the local bar. Tactically poor judgment may not alone be sufficient to trigger a finding of ineffectiveness but

when combined with non-membership incompetency is a reasonable finding, U.S. v. Butler, 504 F.2d 220 (D.C. Cir., 1974).

In the case at bar, defense attorney Gregg, citing angina pain at the close of trial, offered to put on his son, an undergraduate at Mississippi College, to make the closing argument. While nurturance and training of the oncoming generation may be an important value in our society, had attorney Gregg succeded in his wish to put on a person without bar membership or law school training in a crucial stage of the trial, the Butler situation would have been triggered.

Originally, the test for counsel's adequacy in representation was the farce and mockery standard, to wit that the attorney's general performance must be so deficient that the resultant proceeding must make a farce and a mockery of the notion of justice. Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir., 1978), noted that several circuits once held to this test and subsequently abandoned it, 586 F.2d 1325 at 1328. Today's modern standard held by the majority of circuits* states that mere reputability of counsel will not in and of itself refute a challenge to counsel's competent conduct of a criminal trial but that effective assistance must offered that is "'within the range of competence

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* The decisions of the circuits abrogating the farce and mockery test and adopting the reasonable competence test are as follows: United States v. DeCoster, 159 U.S. App. D.C. 326; 331, 487 F.2d 1197, 1202 (D.C. Cir. 1973); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir., 1978); Moore v. United States, 432 F.2d 730, 736 (3rd Cir., 1970); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir., 1977, cert. denied 435 U.S. 1011 (1978); Akridge v. Hopper, 545 F.2d 457, 459 (5th Cir.), cert. denied 431 U.S. 941 (1977); United States v. Toney, 527 F.2d 716, 720 (6th Cir., 1975), cert. denied 429 U.S. 838 (1976); United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), cert. denied, 423 U.S. 876 (1975); Reynolds v. Marbry, 574 F.2d 978 (8th Cir., 1978), Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir., 1978), cert. denied, 440 U.S. 945 (1980); and Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc), cert. denied, 445 U.S. 945 (1980). The Second Circuit's retention of the farce and mockery test is exemplified by Rickenbacker v. Warden, 550 F.2d 62, 65 (2nd Cir., 1976).

demanded of attorneys in criminal cases,'" ibid at 1329, citing McMann v. Richardson, 397 U.S. 759 at 771 (1970).

In dissenting from the denial of certiorari in Romero v. U.S., docket 81-6463, 51 U.S. Law Week 3284, Mr. Justice White noted that the influential Second Circuit had remained steadfast in its adherence to the farce and mockery test while every other circuit has adopted a "reasonable competence" standard or some variant thereof. Mr. Justice White strongly implied the necessity of harmonizing this conflict and securing a uniform standard for effectiveness of counsel's assistance.

The state of Mississippi maintains the farce and mockery test of competence, Henry v. State, 154 So.2d 289 at 296, (1963); Rogers v. State, 307 So.2d 551 at 553 (1975). In addition, the Mississippi courts have held that where an accused retains his own counsel, he is barred from questioning that attorney's competency, Miller v. State, 231 So.2d 178 (1970).

The Mississippi Supreme Court believed that the cursory observations of the officers the first time they came into the premises at 109 Keystone Court was a "search" for evidence. The court rationalized that to preserve the integrity (if that is the right word) of the intrusion, they had to rush out of the house in pursuit of Mrs. Roberts' welfare to attempt to locate her on the grounds when it became obvious that she was not in the defendant's apartment. Having found Mrs. Roberts' body the court reasoned that the police might return --- without a warrant --- to continue their "search". In its tortured reasoning the court stated at 419 So.2d 563 at 573, "The original search in the present case was not completed due to the overriding importance of first locating Mrs. Roberts." The court blithely ignores the fact that after finding Mrs. Roberts the officers were still without a warrant and now had no exigent reasons for being on the premises at 109 Keystone Court, cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

(1971). Furthermore, the court makes a great leap of faith in entertaining the notion that the over-the-shoulder glances into the bedroom of the officers in search of Mrs. Roberts the first time they entered 109 Keystone Court constituted a "search" or even the beginnings of a search.

While it was held in U.S. v. Brand, 556 F.2d 1312 (5th Cir., 1977) that where an officer legally entered a house to assist ambulance attendants with a drug overdose victim, other officers could follow legally even when and though the exigent circumstances justifying the initial entry no longer existed (a result which the instant petitioners question given the reasoning of the court in U.S. v. Carter, 522 F.2d 666 at 674, infra), the officers must confine their intrusion to the scope of the original invasion unless a warrant is issued mandating a more wide-ranging search. Here the initial intrusion involved a cursory-at-best "search," and pace Brand no justification for more than a glance at the inside of the dwelliing existed for returning officers.

The seriousness of the offense of homicide with which a defendant was charged did not, of itself, present such exigent circumstances as to justify a four-day search of an apartment after arrests were made, especially since no emergency threatening life and limb or the integrity of the law enforcement process was involved (no warrant had been issued), Mincey v. Arizona, 437 U.S. 385 (1977). It was held that the original intrusion of the apartment to arrest Mincey (cf. to find Mrs. Roberts) was not so great as to justify the additional intrusion of the four-days' intensive search.

While officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would allow the escape of the suspect or the destruction of critical evidence, Katz v. U.S., 389 U.S. 347 (1967), see also Warden of Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967),

the case of Chimel v. California, 395 U.S. 752 (1969) defined as unreasonable a warrantless search incident to a lawful arrest that went beyond defendant's person and that area from which he might feasibly have obtained a weapon or something that might have been used in evidence against him. Further, U.S. v. Nelson, 459 F.2d 884 (6th Cir., 1972) saw at least one circuit court strictly and narrowly limit exigent circumstances exceptions allowing warrantless searches, particularly when applied to residential premises.

The problem is, as stated in U.S. v. Carter, 622 F.2d 666 (D.C. Cir., 1975), that Coolidge may be seen by some courts as a bludgeon for destroying the strict limitations on warrantless searches incidental to the seizing of a perpetrator established by Chimel. Carter involed hot pursuit of an individual with an arrest but not a search warrant and entry of his attic to search for dangerous contraband with the rationale that his armed cohorts might be hiding there.

The Carter court stated:

> In considering the circumstances of this seizure in the context of "plain view" analysis, it is of consequence that we heed warning of the Supreme Court in Coolidge v. New Hampshire that "to permit warrantless plain-view seizures without the limit would be to undo much of what was decided in Chimel..." 522 F.2d 666 at 674.

The circumstances of Carter, the possible presence of armed men in the house where a cache of stolen arms was located, did not present sufficient justification for a "protective" search of the entire house; it was stated that a rule permitting warrantless searches residence-wide in any instance where an arresting officer hypothesized the presence of armed felons or noticed a potential vantage point for a sniper might very well abollish the Chimel doctrine for all but plate glass houses, ibid at 675.

The police in the instant case barely noticed much less seized any evidence in their first exigently justified entry into 109

Keystone Court, cf. Mincey, 437 U.S. 385 at 392-393, where a rescue exception is allowed as to seizing plain view evidence. Under these circumstances, Brand, Mincey, and Carter define strong limitations on what they might search for and seize on a second visit the 109 Keystone Court premises without any justification of exigent circumstances.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

/s/

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APPENDIX A

Willie Albert SMITH

v.

STATE of Mississippi.

No. 53564.

Supreme Court of Mississippi.

Aug. 11, 1982.

As Modified on Denial of Rehearing Sept. 22, 1982.

Defendant was convicted in the Circuit Court, Hinds County, William F. Coleman, J., of capital murder, and defendant appealed. The Supreme Court, Broom, J., held that: (1) no reversible error occurred in admission of testimony by keeper of municipal court records concerning alleged prior convictions of defendant, even though defendant testified that his age and social security number were different from those of person referred to in the court records; (2) Mississippi death penalty statutes' failure to allow jury to sentence defendant to life imprisonment without parole did not render the statutes violative of Eighth and Fourteenth Amendments; (3) evidence was sufficient to link defendant with killing of victim and to establish beyond reasonable doubt that he was guilty person, as required to support conviction for capital murder; (4) evidence presented during sentencing phase of capital murder prosecution was sufficient to support imposition by jury of death penalty; (5) investigating officers' belief that the victim was probably on premises of defendant's residence and either in extreme danger or in need of immediate assistance was sufficiently reasonable and well-founded to justify, under "emergency doctrine" exception to warrant requirement, officers' original, nonconsensual entry into defendant's apartment; and (6) crime lab technicians' "re-entry" into the apartment did not violate defendant's Fourth Amendment rights.

Affirmed.

1. Criminal Law ⇐1036.1(2), 1044.1(5)

Reversible error cannot be predicated upon trial court's failure to exclude evidence as to which there has been no timely objection or motion to exclude.

2. Criminal Law ⇐1169.11

No reversible error occurred in admission of testimony by keeper of municipal court records concerning alleged prior convictions of defendant, even though defendant testified that his age and social security number were different from those of person referred to in the court records, where defense counsel originally brought up subject of defendant's past criminal record, and defense counsel did not object to portion of arrest record brought out by record keeper.

3. Constitutional Law ⇐276(1)
Criminal Law ⇐1206(1), 1213

Mississippi death penalty statutes' failure to allow jury to sentence defendant to life imprisonment without parole did not render the statutes violative of Eighth and Fourteenth Amendments. Code 1972, §§ 97-3-21, 99-19-101; U.S.C.A.Const. Amends. 8, 14.

4. Criminal Law ⇐438(1)

Competency, relevancy, and materiality of photographs are matters residing within sound discretion of trial judge.

5. Criminal Law ⇐1168(2),

No reversible error occurred in photographic slides, which had previously been admitted into evidence, being projected upon screen during state's closing argument in sentencing phase of capital murder prosecution.

6. Homicide ⇐234(1)

Evidence was sufficient to link defendant with killing of victim and to establish beyond reasonable doubt that he was guilty person, as required to support conviction for capital murder. Code 1972, §§ 97-3-21, 99-19-101.

7. Homicide ⇐354

Evidence presented during sentencing phase of capital murder prosecution was sufficient to support imposition by jury of

death penalty. Code 1972, §§ 97-3-21, 99-19-101.

8. Homicide ⇐340(1)

In capital murder prosecution, no reversible error occurred in giving of instruction allowing jury to find aggravating circumstance that murder was committed for pecuniary gain, even though jury was also instructed that it could find that the murder was committed while defendant was engaged in commission of robbery. Code 1972, §§ 97-3-21, 99-19-101.

9. Searches and Seizures ⇐3.3(1)

Investigating officers' belief that the victim was probably on premises of defendant's residence and either in extreme danger or in need of immediate assistance was sufficiently reasonable and well-founded to justify, under "emergency doctrine" exception to warrant requirement, officers' original, nonconsensual entry into defendant's apartment. U.S.C.A.Const.Amend. 4.

10. Searches and Seizures ⇐3.3(1)

Basic elements of "emergency" exception to warrant requirement are: police must have reasonable grounds to believe that there is emergency at hand and immediate need for their assistance for protection of life or property; search must not be primarily motivated by intent to arrest and seize evidence; and there must be some reasonable basis, approximating probable cause, to associate the emergency with area or place to be searched. U.S.C.A.Const. Amend. 4.

11. Searches and Seizures ⇐7(1)

Crime lab technicians' "re-entry" and warrantless search of defendant's apartment did not violate defendant's Fourth Amendment rights where investigating officers had made proper, "emergency" entry into the apartment approximately 50 minutes earlier, investigating officers did not seize any evidence during initial search, technicians' reentry was confined to area of initial intrusion, and items seized by technicians had been observed to be "in plain view" during officers' initial search of premises. U.S.C.A.Const.Amend. 4.

Minor F. Buchanan, Jackson, John E. Gregg, Raymond, for appellant.

Bill Allain, Atty. Gen. by Robert D. Findley, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before the Court En Banc.

BROOM, Justice, for the Court:

Death penalty sentence resulted from the capital murder trial of Willie Albert Smith (defendant) in the Circuit Court of the First Judicial District of Hinds County, the Honorable William F. Coleman, Circuit Judge, presiding. The indictment charged that the defendant murdered Shirley Roberts while "engaged in the commission of the crime of robbery of said Shirley Roberts ..." On his appeal, the defendant (1) challenges several evidentiary rulings made by the trial court, (2) contends that the verdict and sentence were unsupported by the "weight of the evidence", and (3) asserts that Mississippi Code Annotated §§ 97-3-21 and 99-19-101 (Supp.1981), are unconstitutional as violative of the Eighth and Fourteenth Amendments to the United States Constitution. We affirm.

Shirley Roberts, the murder victim, was the manager of Tote-Sum Store No. 6, situated on Robinson Street in the City of Jackson. She normally arrived to open the store about 5:15 A.M., but unfortunately on the morning of March 15, 1981, upon her arrival she was assaulted and abducted and subsequently murdered. Kenneth Thomas testified that, shortly after 5:00 on that morning, he was driving by the Tote-Sum in a car with James Wells. As they passed the Tote-Sum store, they saw a black man in the parking lot (later identified as the defendant) grab a white woman who struggled with him. Thomas's driving companion, James Wells, stated that he saw the defendant grab the woman and choke her, but, not wanting to become "involved", they drove on. A few minutes later they returned, at which time Jackson Police Department officer G. E. Otis was present. They related to Otis what they had seen a

few minutes earlier. Officer Otis conducted a preliminary search and discovered in the parking area by the Tote-Sum store the following items: car keys, brass knucks, a twenty-dollar bill, a woman's (right) tennis shoe, and a pair of eyeglasses. Witness Thomas indicated in his testimony that Mrs. Roberts was about to unlock the store when the defendant grabbed her. Thomas last saw the woman at approximately the spot where the glasses, brass knucks and tennis shoe were found. At trial, Thomas testified that the next day he identified the defendant in a lineup as the person with whom the woman struggled outside the store.[1] Thomas's testimony was substantially corroborated by that of his friend, James Wells.

Officer Otis testified that he was present at the store when Thomas and Wells arrived and related to him the incident they had seen transpire between the defendant and the woman (Mrs. Roberts) in the parking lot. He conducted a preliminary search at the exterior of the store and discovered the twenty-dollar bill, car keys, brass knucks, a woman's-type tennis shoe and eyeglasses. The officer determined that a car in the parking lot was that of Mrs. Shirley Roberts, but she was not on the premises. Then Officer Otis noticed a red Pinto traveling on Robinson Road which fit the description of the suspect's car given him by Thomas and Wells. A few minutes later he stopped the vehicle which was being driven by defendant Willie Albert Smith. During the process of stopping the defendant, Officer Otis saw the defendant put something under the right side of the front seat, which, upon investigation, was discovered to be a shoe: the mate to the one found at the parking lot. Otis observed mud and blood on the defendant's hands and arrested the defendant. The defendant told Otis that he had borrowed the red Pinto from one Edward Charles McDonald and directed the officer to McDonald's address. McDonald, in turn, directed them to an apartment off Henley Street where the defendant lived. During their investigation, the officers followed a "drag trail" from the house to a wooded area where they came to a ditch of water covered with leaves, from which a human foot protruded. The body in the water was later identified as that of the victim, Mrs. Shirley Roberts.

Cause of death, according to the testimony of Dr. Rodrigo Galvez, was manual strangulation or choking. He found scratches and abrasions about her knees, ankles, and on her right hip. There was a marking around her neck. Testifying in his own defense, the defendant denied that he had ever seen Mrs. Roberts or that he had anything to do with her death or any robbery. Additional facts will be stated as needed in this opinion.

The first argument made by the defendant is that the trial court "committed reversible error by admitting (sic) the prosecution to introduce the criminal record of another as being that of the defendant's ...." On direct examination, the defendant gave testimony pertaining to his prior criminal record, and during his cross-examination he was queried about prior convictions of disorderly conduct and resisting arrest, which he denied. In rebuttal, the state called the keeper of the Jackson Municipal Court records, Mr. Gladney, who testified that a Willie Albert Smith had been convicted for disorderly conduct and resisting arrest. On cross-examination, Gladney stated that according to his records Willie Albert Smith would be twenty years old at the time of trial of this cause, and had lived at 118 Bonair in Jackson, and had a social security number of 426-21-4009. The defendant testified that he was twenty-three years old at the trial date, had never lived at the mentioned address, and had a different social security number from the one produced by Gladney. He contends that

1. On cross-examination, Thomas' version of the identification process became somewhat confused and contradictory. The appellant apparently contends that such impeachment on cross-examination renders the record devoid of any testimony which will support a finding that Thomas identified the defendant the next day in a lineup. Such contradictory statements go only to the weight and credibility of the witness's testimony, which is properly solely within the province of the jury.

the conviction record of disorderly conduct and resisting arrest was in fact the record of another person and that its use constituted reversible error.

[1, 2] We note that first to bring up the subject of the defendant's past criminal record was his own counsel, who asked the defendant about two prior convictions which he acknowledged. Then counsel made no objection to Officer Gladney's testimony, and at no time during the trial was there any attempt on the part of the defense to have the testimony excluded. Our general rule is that reversible error cannot be predicated upon the trial court's failure to exclude evidence as to which there has been no timely objection or motion to exclude. *Black v. State*, 308 So.2d 79 (Miss. 1975). Nevertheless, we have here considered the argument. We point out that when one gives data to arresting officers or to a court clerk, the content may be true and accurate, or may be false and misleading. Of course, the jurors were allowed to hear all of the evidence concerning the names and identification and other data in question which raised a question of credibility for them to consider. In the jury's evaluation of the defendant's credibility, the decision as to the weight to be accorded this evidence was within the sole province of the jury's role as fact trier. Defense counsel's election to bring up the subject of the past criminal record cannot be charged to the prosecution or the trial court. Defense counsel's further election not to object to the portion of the arrest record brought out by Officer Gladney may have been a trial strategy decision to gain the jury's sympathy by attempting to put the prosecution in the unfavorable light of unfairly using the criminal record of another defendant. Reversible error cannot be predicated upon this aspect of the case.

[3] The next argument advanced by the defendant is his contention that Mississippi Code Annotated §§ 97-3-21 and 99-19-101 (Supp.1981) "are unconstitutional and violative of the Eighth and Fourteenth Amendments to the United States Constitution." He says that § 97-3-21 "is unconstitutional in that it does not allow the jury to sentence a defendant to life imprisonment without parole." The following is asserted in his brief:

> [T]he only instances in which one may be sentenced to life without parole are: (1) § 99-19-107, Mississippi Code of 1972, which states that in the event the death penalty is held unconstitutional, the person shall be sentenced to life without parole; (2) § 99-19-81 and 83 of said Code which are commonly called the habitual offender act, and (3) if one is convicted of armed robbery and given life, then § 47-7-3(d) of said Code would prevent his release or make his sentence life without parole.

He contends that because of the different sentencing options available under our present statutory scheme "and the absence of life without parole the imposition of the death penalty denies equal protection of the law and amounts to cruel and unusual punishment in view of the available options." He says that under the present law execution is the only means by which a jury can be sure that the defendant will not be released and again return to society. He takes the position that regardless of how a jury might view an individual case, death is the only means to prevent the defendant from ever being released again. Further, he asserts "that the death penalty is per se cruel and unusual punishment" ... and "that the absence of the alternative form of sentencing ... denies equal protection of the law ..."

According to our prior decisions, the legislature's prerogative is to define crimes and set the punishment for offenders. *Peterson v. State*, 268 So.2d 335 (Miss.1972). Also, we have held in a number of instances that the death penalty is not *per se* unconstitutional. *Bullock v. State*, 391 So.2d 601 (Miss.1980); *Washington v. State*, 361 So.2d 61 (Miss.1978). Similar issues were before the Court in *Capler v. State*, 237 So.2d 445 (Miss.1970), wherein we stated:

> *Viewing the statute as here construed, the fact that a jury could impose life imprisonment in one case and death in*

another, or different punishments in the same case, does not result in the possibility of unequal punishment to that class of persons convicted of murder in the first degree. The legislature has a very great latitude in prescribing and fixing punishment for crime. *Id.* at 451. (Emphasis added). (Quoting from *State v. Latham*, 190 Kan. 411, 375 P.2d 788 (1962), *cert. denied* 373 U.S. 919 [83 S.Ct. 1310] 10 L.Ed.2d 418 (1963)).

The defendant is basically contending that the fact that the legislature declined to allow a jury to choose among conceivable gradations of punishment between the two statutorily specified alternatives, renders those statutory alternatives cruel and unusual. To follow his reasoning to its logical conclusion, any statute imposing such alternative penalties must allow for the jury to determine at *exactly what point in his sentence the defendant should become eligible for parole.* Such determinations are clearly within the legislative and executive province. The legislature's decision to provide two alternative penalties, with clear guidelines for the application of each, is unquestionably within their proper discretion. Accordingly, this argument lacks persuasion.

[4, 5] The next issue raised by the defendant is whether the trial court erred in "allowing photographic slides previously admitted in evidence to be projected upon a screen during the state's closing argument in the sentencing phase." Our rule has long been that competency, relevancy, and materiality of photographs are matters resting within the sound discretion of the trial judge. *Reddix v. State*, 381 So.2d 999 (Miss.1980). In the instant case, there is no indication that the photographs were inordinately gruesome or that they would have inflamed a juror. The photographs have probative value going to the nature of the wounds inflicted upon the victim. On the issue of whether the offense was especially heinous, atrocious or cruel, it is likely that the photographs likewise had some probative value, and accordingly their being allowed into evidence does not constitute reversible error. *Coleman v. State*, 378 So.2d 640 (Miss.1979).

Next the defendant contends that the jury's verdict at both the guilt and sentencing phases of the trial is "contrary to the great weight of the evidence." This portion of his argument, constituting only one page of his brief, sets forth neither logic nor authority in support of his bare contention that the verdict of guilty and the sentence of death were unsupported by the weight of the evidence.

[6] Strong and convincing evidence links the defendant with the killing of Mrs. Roberts and establishes beyond a reasonable doubt that he was the guilty person. He was seen struggling with a woman at the Tote-Sum Store. In the car he was driving when stopped was a woman's tennis shoe identified as that of Mrs. Roberts, matching another shoe taken from the parking lot just outside the store where she was seen struggling with the defendant. In that same location were found her eyeglasses, and a pair of brass knucks which, according to his friend Charles McDonald, appeared to be the same knucks shown McDonald during the preceding night at the wedding party.

Edwina Ard, a criminalist with F.B.I. training, testified that blood taken from the defendant's khaki pants was identical to Shirley Roberts' blood in all aspects tested, and that only .29%, considerably less than 1%, of the population had that particular combination of blood characteristics. Joe E. Andrews, also an F.B.I.-trained forensic scientist, specializing in hair and fiber identification, testified that he compared samples of pubic hairs taken from the defendant with combings obtained from the pubic area of Shirley Roberts, and found the same microscopic characteristics.

The defendant's version was that he had never seen Mrs. Roberts and had nothing to do with her death. On the witness stand he testified that at about 4:30 or 4:35 A.M. he borrowed Charles McDonald's car, a red Pinto, with instructions to return it by 7:00 A.M. He stated that he was using the car to deliver a package to the University Medical Center area but had car trouble and

returned to his apartment to make repairs. There, he was afraid to enter because the lights were on in his apartment and the radio playing. Instead of going inside, he changed into some clothes and shoes that were outside. He further testified that he "turned to leave the front porch and fell backwards and passed out and did not awaken until morning." After he awakened, he drove down Robinson Road and he observed a police car, which reminded him that his driver's license had expired. According to the defendant, he threw out a package of marijuana after which he was stopped while reaching for a cigarette he had dropped. He denied ever having the woman's shoe that was found in his car, but asserts that he saw the policeman put the shoe in his car. After hearing Charles McDonald testify that he (defendant) had a pair of brass knucks at the party, the defendant denied having the knucks.

[7] On the witness stand during the sentencing phase, the defendant admitted that on two prior occasions he had been in an altercation and had shot a weapon in an argument about a van and on another occasion had shot up in the air during an argument with his brother-in-law. Testifying for him at the sentencing phase were his mother and several relatives who had a rather high opinion of him but who knew about his prior difficulties. We cannot say that the jury's verdict, returned at either the guilt phase or the sentencing phase, was unsupported by the evidence beyond a reasonable doubt.

[8] The next argument asserted by the defendant is that the trial court erred during the sentencing phase in allowing the jury to find that the murder was committed for pecuniary gain. Precisely, the defendant contends "that this aggravating circumstance is meant to cover capital offenses committed for compensation from another source, i.e., a hired assassin, or one who murders to collect other benefits, as distinguished from robbery. There was no evidence of a pecuniary gain in this meaning throughout the entire trial."

Instruction number S-4 allowed the jury to find from the evidence the following aggravating circumstances if any:

1. The capital murder was committed while the defendant was engaged in the commission of robbery;

2. The capital murder was committed for pecuniary gain;

3. The capital murder was especially heinous, atrocious or cruel.

The defendant's position is that the inclusion of the second enumerated aggravating circumstance, i.e., that the capital murder was committed for pecuniary gain, renders the allowance of this instruction reversible error for reason that the same burdened him with "the necessity of overcoming two aggravating circumstances" when he had been "charged with a murder during the course of a single felony." When the Court along with counsel was considering state's instruction number S-4, the following is excerpted from the record:

BY MR. GREGG:

If the Court please, for purposes of the record, I would object to it because I don't think that has been proven beyond a reasonable doubt. I just make that for record purposes.

Obviously the defense objection made at the trial level was not on the same ground here argued, and ordinarily cannot on appeal be ground for reversal upon a different ground from that asserted below. *Daumer v. State*, 381 So.2d 1014 (Miss.1980). Nevertheless, we have specifically upheld the instruction now attacked, and we can find no merit to the present argument. *Voyles v. State*, 362 So.2d 1226 (Miss.1978); *Bell v. State*, 360 So.2d 1206 (Miss.1978).

As his final argument, defendant asserts that the trial court "erred in overruling defendant's motion to suppress evidence taken from the defendant's apartment and further erred by admitting the evidence in the trial ..." The defendant points out that the law officers "made a cursory search of the apartment and failed to discover" Shirley Roberts. Raising no challenge to the officers looking inside the apartment for Mrs. Roberts, the defendant

states that they failed to seize any evidence during this first search of the apartment which they exited and went outside and then discovered her body 40 to 50 yards away. The officers informed the mobile crime lab personnel about the objects they had seen in the house. He notes that the crime lab technicians came and removed the victim, and it was their "re-entry" and warrantless search of the apartment (made without the defendant's consent) to which he now, as he did at the trial level, objects. During re-entry of the apartment, an evidence technician (officer) seized a padlock, two pair of pants, a pair of shoes, a wallet, a purse, a sweater, a blanket, and the sheets from the appellant's bed, and took photographs. Also "re-entering" the apartment were police officers Adams, Patton and Poundren of the Mobile Crime Lab, who pointed out the observed objects.

The defense argues that this evidence, taken during re-entry of the apartment and used at trial, was extremely prejudicial and should have been excluded. He concedes that the rule against warrantless searches is subject to a few "specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). He theorizes that this "second" search was not incident to any established exception to the warrant requirement, and that the state failed to meet its burden to show any exception to that requirement. In reply, the state correctly notes that no full-fledged extensive investigatory search was conducted, and that the items which were seized had been observed to be "in plain view" during the initial search of the premises. Both the original entry and subsequent re-entry were closely related in time, and the re-entry was confined to the area of the initial intrusion. Under such factual circumstances the seizure of those items was not violative of Fourteenth Amendment proscriptions.

The record is somewhat ambiguous regarding the sequence of events surrounding the search. For the purposes of clarity, the following chronology of events is set forth:

4:30 A.M.	Smith borrows McDonald's car.
5:00–5:10 A.M.	Smith seen leaving Tote-Sum with Mrs. Roberts, by two witnesses.
5:20 A.M.	Sgt. Otis arrives at Tote-Sum to make phone call. The two witnesses approach him and relate the incident they observed, describing with particularity the vehicle involved. Sgt. Otis radios this information to headquarters and locates one of the victim's shoes (and other items) in the parking lot. Sgt. Otis remains at the Tote-Sum for approximately 45 minutes.
5:40 A.M.	Officer Terry Grice arrives at the Tote-Sum in response to Otis's radio call. He leaves shortly thereafter.
6:15–6:20 A.M.	Sgt. Otis, still at the Tote-Sum Store, sees a red Pinto fitting the witnesses' description approach the store, do a "U-turn" and leave. He pursues and stops the vehicle. He asks the driver, Willie Albert Smith, to get out of the car. Smith has no driver's license on his person. Upon exiting the vehicle, Smith gets belligerent. Sgt. Otis observes the other shoe in the car and places Smith under arrest. Sgt. Otis observes mud and blood on Smith's hands.
6:20–6:25 A.M.	Officer Grice arrives at the scene of the stopped vehicle.
6:30 A.M.	Sgt. Otis, Officer Grice and others go to McDonald's house (the owner of the car). They stay approximately 10 minutes, during which time McDonald agrees to show them to Smith's house. Smith is still in Sgt. Otis's car.
6:45 A.M.	Officers meet at Smith's apartment. Sgt. Otis remains at the car with Smith. Officers Grice and Roebuck make the first search of the house, looking for Mrs. Roberts. During the course of this search, they observe several articles, including some articles of women's clothing, but do not stop to collect any of these articles. They search the house for approximately 4 minutes and determine that Mrs. Roberts is not in the house. They exit.
6:50 A.M.	Search begins outside the house.
7:12 A.M.	Mrs. Roberts' body is discovered.
7:20 A.M.	The mobile crime lab arrives on the scene with Officer Walter Welch and three others, approximately

30 minutes from the first officers' arrival and search.
Upon being informed of the existence of certain articles in the house, they enter the house and enter Smith's bedroom.
They stayed in the room approximately 30 to 35 minutes, photographing the room and removing the articles on Smith's bed and on the floor.
9:00 A.M. The police leave the scene.

For clarity, we summarize the status of the situation at approximately 6:30 A.M. when the officers, with Smith in custody, arrived at his house (apartment). Two eyewitnesses had reported an assault and abduction. One of the victim's shoes had been found at the store and the other in the defendant's car. The defendant (with bloody hands) had been taken into custody within approximately one hour from the time of abduction, and the officers were in front of his house, a relatively short distance from the scene of the abduction.

In the context of these circumstances, the record shows that Officer Grice, a Jackson Police Department official, accompanied by several other officers, first entered the apartment trying to locate Mrs. Roberts, "because we were worried about her well being. We didn't know whether she could possibly have been injured or something like that and we were concerned about her well being."

[9] Given the above situation, were officers Grice and Roebuck within their legal authority in making a warrantless search of Smith's apartment without his consent? Courts in all jurisdictions have long recognized the existence of an "exigent circumstance" or "emergency doctrine" exception to the requirement for a warrant for search and seizure. The "emergency doctrine" has its roots in the common law, *U. S. v. Barone*, 330 F.2d 543 (2d Cir. 1964). Many recent decisions, both state and federal, have recognized that "important legitimate governmental interests may override the Fourth Amendment warrant requirement when official conduct is prompted by the motive of preserving life and reasonably appear[s] to be necessary for that purpose." *United States v. Perez*, 440 F.Supp. 272, 288 (N.D. Ohio 1977), at n. 45, (see also cases cited therein).

Conduct prompted by the motive of preserving life has been upheld by the courts in a wide variety of circumstances. *People v. Mitchell*, 39 N.Y.2d 173, 383 N.E.2d 346, 347 N.E.2d 607 (N.Y.1976); *United States v. Perez*, 440 F.Supp. 272 (N.D. Ohio 1977); *Patrick v. State*, 227 A.2d 436 (Del.1967); *Wayne v. United States*, 318 F.2d 205 (D.C. Cir.1963), (Burger, Circuit Judge, concurring). See generally, LaFave, Search and Seizure, § 6.6 (1978). Obviously there is well-established judicial acceptance of the "emergency" or "exigency" doctrine as a narrowly defined exception to the general requirement of a warrant for all searches and seizures. What constitutes an emergency or an exigency that will allow such a warrantless search?

[10] The basic elements of the exception may be summarized in the following manner: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize the evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

When may an officer claim an emergency or exigent circumstances so as to justify his warrantless entry and search of premises for which there is a "reasonable expectation of privacy?" (See *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), (Harlan, J., concurring)). As then Circuit Judge Burger noted in *Wayne v. United States*, *supra*:

> Neither the Constitution, statutes or judicial decisions have made the home inviolable in an absolute sense. Collectively they have surrounded the home with great protection but protection which is qualified by the needs of ordered liberty in a civilized society.

Breaking into a home by force is not illegal if it is reasonable in the circumstances. 318 F.2d at 211–12.

The reasonableness of those circumstances must be evaluated on a case by case basis. In light of the sequence and the timing of the events which transpired on March 15, 1981, Officers Grice and Roebuck's belief that Mrs. Roberts was probably on the premises of defendant Smith's residence and either in extreme danger or in need of immediate assistance was sufficiently reasonable and well-founded to justify their original entry into defendant Smith's apartment. The legality of this entry is conceded by defense counsel.

[11] Once lawfully within Smith's apartment, the question arises as to the authority of the officers to effect seizures of certain objects within the dwelling. This question was asked somewhat rhetorically by then Circuit Judge Burger in *Wayne*, supra:

> Are we to say that police or firemen may enter to apply a tourniquet or resuscitator, for example, but may not act on evidence of a crime which they then observe incidentally without any search? 319 F.2d at 212.

Certainly it cannot be said that the mere existence of either exigent circumstances or an emergency justifies a warrantless search unlimited in scope. The limits in the scope of a warrantless search undertaken pursuant to the emergency doctrine are embodied in the plain-view rule as set forth by the United States Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).[2]

In *Coolidge*, the United States Supreme Court points out that anytime any evidence or contraband is seized, such evidence or contraband is almost always in "plain view". Therefore, the question is to determine both the legality and the legal significance of the circumstances bringing the officer into view of the evidence in question. "Plain view" in and of itself is never enough to justify the warrantless seizure of objects. No amount of probable cause alone will suffice to justify such a "plain view" seizure. 403 U.S. at 468, 91 S.Ct. at 2039, 29 L.Ed.2d at 586. However, when the "plain view" of an object is coupled with sufficiently "exigent circumstances", the warrantless seizure of such an object is permitted. *Coolidge* gives several examples of these types of exigent circumstances: (1) when an incriminating object is discovered pursuant to a lawful search (via search warrant) for other specified objects; (2) when the incriminating object comes into plain view during the hot pursuit of a fleeing criminal; (3) when the incriminating object comes into plain view during the limited search of a suspect incident to an arrest; (4) when an officer is not searching for evidence, but inadvertently discovers the incriminating object.[3] In the instant case, the officers' original justification for entry into Smith's apartment clearly falls within the "exigent circumstances" as set forth in *Coolidge*.

Consideration of the search of the defendant's apartment and the subsequent seizure of the articles in question does not

2. The defendant relies upon the Mississippi case of *Isaacks v. State*, 350 So.2d 1340 (Miss. 1977), claiming that the list of four circumstances in which the "plain-view" seizure of contraband is held to be authorized is exhaustive in nature. Such reliance is misplaced. The four circumstances enumerated in *Isaacks* come essentially from the *Coolidge* case, with the exception of the fourth requirement, "incident to a search of a stopped automobile on probable cause or because of the mobility of the vehicle." *Isaacks* at 1344. This listing of the four circumstances in *Isaacks* should not be read as constituting an exhaustive enumeration, but rather should be read under the doctrine of *ejusdem generis* as being examples of the types of circumstances which are discussed in the *Coolidge* case within the overall framework of a Fourth Amendment analysis.

3. The Supreme Court cites *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067, as an example of this exigent circumstance. The *Harris* case, it should be noted, involved the discovery of a car registration card during the process of impounding an automobile. The court upheld the inadvertent discovery of the registration card since such discovery was the result of a "measure taken to protect the car." Surely measures taken to protect a life are infinitely more worthy of justification.

stop with the justification for the initial entry and a discussion of whether a seizure of the incriminating objects *at that time* would have been lawful. Officers Grice and Roebuck left the house after satisfying themselves that Mrs. Roberts was not in the house. They then proceeded to search the area immediately surrounding the house where they discovered Mrs. Roberts' body. Defense counsel contends that at this point the exigent circumstances lapsed and any subsequent re-entry into the house required a warrant. A proper analysis of *Coolidge* and the underlying basis for the justification of "plain view" seizures reveals the fallacy in this contention. What if the police, upon their lawful entry into the defendant's apartment, and after seeing the various articles of clothing, etc. lying in plain view upon the bed and the floor, and recognizing them for their evidentiary value, had stopped to gather them up, log their positions in the room, and otherwise insure that their evidentiary value was preserved? Such actions on the part of the police officers might have cast grave and possibly fatal doubts upon the validity of the exigent circumstances justifying their initial entry. *See Root v. Gauper*, 438 F.2d 361 (8th Cir. 1971). A careful analysis of the actions of the officers upon reaching the scene of the "emergency" is vital to insure that the emergency doctrine exception to the requirement of a warrant does not escape its bounds and engulf the general rule. In the instant case, any actions on the part of the police officers other than those which clearly reflected their belief that Mrs. Roberts was in the vicinity, either in the house or immediately outside it, would have tended to cast doubts upon the validity of their search.[4]

Viewed from this perspective, the conundrum of the emergency doctrine exception becomes apparent. If the officers stopped to seize the evidence in plain view, their initial search is invalidated since their actions would not have been consistent with the existence of an emergency. If they continue to search for the victim, so that the object is no longer in plain view, they may not return and seize the incriminating objects without first obtaining a search warrant. The solution to this dilemma must follow one's viewing the totality of the circumstances surrounding the initial entry and search. From the time of their initial entry, the officers of the Jackson Police Department were engaged in only one search. That search had only one goal: locating Mrs. Roberts (and assisting her, if not too late). The actions of Officer Welch and the other members of the mobile crime lab (after the re-entry of the apartment) were merely to effectuate the physical seizure of articles in plain view which Officers Grice and Roebuck would have been able to seize had not the circumstances been so "exigent". There was no unwarranted delay in time, nor was there any expansion of the scope of the search. The fact that the actual physical taking of the items into the custody of the police was effectuated by an evidence technician who was trained to preserve the evidentiary value of the objects, rather than by the first officers to view the objects, is not significant.

The state cites the case of *La Fournier v. State*, 91 Wis.2d 61, 280 N.W.2d 746 (1979), which dealt with the validity of a warrantless search and seizure of evidence following an initial entry into the defendant's place of residence. In that case, the first officer who entered the residence did so without a warrant under the "emergency rule". He observed "plain view" incriminating evidence and called for assistance much as happened in the instant case. He called for other officers to "secure the scene" and left. Three other officers came within about fifteen minutes and entered the defendant's premises. Evidence seized during this alleged "second entry" was sought to be suppressed. The Wisconsin Supreme Court upheld the last entry and seizure of evidence, and stated:

> The three officers did no more than Weiland would have been justified in do-

4. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), relied upon by the defendant, is factually quite different from the present case and not controlling.

ing had he remained on the premises. They entered the same area of the house in which Weiland had found the drug victim and in which the contraband was discovered in plain view. These officers were called as backup; they were completing that which was lawful under the first entry, securing evidence in plain view. They did not expand the scope or nature of the original entry. Their purpose was limited to the evidence Weiland had found in plain view. That evidence and La Fournier's statement that he had just shot up provided the officers with probable cause for La Fournier's arrest and the custodial search which brought to light the heroin.

Whether a subsequent entry is detached from an initial exigency and warrantless entry or is a continuation of the lawful initial entry can be determined only in light of the facts and circumstances of each case. We conclude that in the instant case the successive intrusions of Weiland and the three officers were close in time and practically identical in nature so as to be analytically and factually inseparable. The entry of the three officers must be regarded as a continuation of Weiland's initial legal entry. No warrant was needed.

Id. at 69–70, 280 N.W.2d at 750–51.

This Court has been confronted with a somewhat similar situation. In *Norman v. State*, 302 So.2d 254 (Miss.1974), the Jackson police and the F.B.I. had arrest warrants for four people, and had received reliable information as to their location. Upon arrival at the house which informants had indicated as the suspects' dwelling, a shootout occurred, killing one officer. Tear gas was employed and the occupants of the house surrendered. The officers entered the house and began to search for weapons. In the process of this legal search, they discovered what appeared to be a bomb. They immediately, and quite reasonably, left the house until an army bomb squad was able to come and remove the bomb from the house. Then they resumed the search. At trial the defendant sought to suppress the objects recovered as the result of this second search, claiming that there had been an illegal re-entry. In upholding the validity of this "second search", we noted several factors which justified the officers' actions. The original search had not been completed due to the discovery of the bomb. During the hiatus of the search, the police officers maintained the status quo awaiting the bomb squad. There was no unreasonable lapse of time. Finally, when search was resumed it was merely a continuation of the original search and hence could not be held to be unreasonable. *See Crum v. State*, 349 So.2d 1069 (Miss. 1977). See also, *Voss v. State*, 198 Tenn. 135, 278 S.W.2d 667 (1955), cert. den., 348 U.S. 965, 75 S.Ct. 526, 99 L.Ed. 752 (1955); *State v. Downey*, 104 Ariz. 375, 453 P.2d 521 (1969).

In the instant case, the justification for the initial search differs from *Norman*, (emergency circumstances versus a search incident to an arrest), but in both situations the officers' presence within the dwelling had a prior legal justification. The original search in the present case was not completed due to the overriding importance of first locating Mrs. Roberts. After the officers first exited defendant Smith's apartment, Jackson police officers continually maintained the status quo around the residence. There was no unreasonable lapse of time between the initial viewing of the incriminating objects and the subsequent physical seizure. Finally, the entry of the house by the members of the mobile crime lab merely constituted a continuation of the original search. The only objects seized were those in plain view (or contained within them) and the only room searched was the one room in which they were seen.

Accordingly, we conclude that the original entry of Officers Grice and Roebuck appears justified under the emergency doctrine exception to the requirement of a warrant for the entry and search of a dwelling. Once in Smith's apartment, they were authorized to seize incriminating objects coming into plain view. The fact that they did not do so at the time is merely evidence of the exigency of the particular

circumstances. The second entry into Smith's apartment by members of the mobile crime lab constituted a continuation of the original search. Therefore, the decision of the trial court to overrule the appellant's motion to suppress those items of evidence recovered as a result of the search of Smith's apartment was not error.

In its (appellee's) brief filed in response to the defendant's (appellant's) brief, the state did not see fit to set forth a statement of facts. Whereupon, this Court in writing (dated July 6, 1982) asked the state to file a "statement of facts as to all pertinent circumstances related to search of the apartment and seizure of evidence." We also asked the state for additional "authorities or decisions" concerning "re-entry of the apartment and seizure of evidence . . ." The state complied with the Court's request, and in response thereto defense counsel filed a pleading by which the appellant "prays that the appellee's brief and attempted supplement . . . be stricken and this case remanded for new trial . . ." Also, defense counsel discussed further the facts surrounding the search of defendant's premises and the seizure of evidence, and set forth his views on cases cited by the state in its response to this Court's request. Defense counsel also asserted additional argument concerning "in court identification" of the defendant by state's witnesses. Also discussed in the response of defense counsel is the issue of the "pretrial identification" of the defendant.

This Court has carefully considered all these matters discussed in the paragraph immediately above, and all propositions argued. Our review of the case has extended to every part of the record which includes motions for change of venue, motion to suppress evidence, discovery motions, jury instructions, and a meticulously detailed motion for new trial. Jury instructions given clearly and adequately advised the jurors in all material aspects of their function. At the sentencing phase, jurors were liberally and specifically instructed as to mitigating circumstances which they were allowed to consider, including the defendant's age, lack of significant criminal record, his employment record, plus "any and all other matters . . ." which the jurors saw fit to "consider from the evidence as mitigating circumstances". Jurors were instructed that they could consider "any circumstance or combination of circumstances" surrounding the defendant's life and character, and surrounding the offense which "reasonably mitigates against imposition of the death penalty." No reversible error has been pointed out by counsel, and we have been unable to find such.

After carefully reviewing this record, we have compared it with all our decisions upholding death penalties subsequent to *Jackson v. State*, 337 So.2d 1242 (Miss.1976). For other cases wherein we have affirmed the death penalty, see *Bullock v. State*, 391 So.2d 601 (Miss.1980). *See also Johnson v. State*, 416 So.2d 383 (Miss.1982). By his own testimony, the defendant admitted that he had a prior record of previous convictions for criminal offenses. He admitted that on two occasions he had fired a deadly weapon in separate altercations with other people. Comparison of this case with the other cases in which we have affirmed the death penalty causes us to conclude that such penalty here is not excessive in view of the aggravating and mitigating circumstances shown. No argument can be logically made that the execution of Smith upon this record would be wanton or freakish. We find that his execution would be consistent and even-handed with all the post-*Jackson* death penalty cases which we have previously affirmed.

At the trial the defendant was ably defended by astute counsel retained by his family. The trial accorded him was fair, and the verdict and sentence were based upon evidence which established his guilt and aggravating circumstances beyond a reasonable doubt.

Affirmance is, therefore, ordered, and Wednesday, the 29th day of September, 1982, is fixed as the date on which the death sentence shall be executed as provided by law.

AFFIRMED.

Office-Supreme Court, U.S.
FILED
FEB 22 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-5922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIE ALBERT SMITH,
Petitioner

VS.

STATE OF MISSISSIPPI
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHERE PETITIONER HAS IGNORED THE ORDER OF THIS COURT TO TIMELY FILE HIS PETITION AND HE FAILS TO DO SO, SHOULD THIS COURT CONSIDER THE MERITS OF THIS PETITION?

II. WHERE THE QUESTION OF COUNSEL'S EFFECTIVENESS AND THE TEST FOR DETERMINATION OF EFFECTIVENESS HAS NEVER BEEN PRESENTED TO THE COURT BELOW CAN IT BE GROUNDS FOR REVIEW HERE?

III. WHERE POLICE MAKE A WARRANTLESS ENTRY UNDER EXIGENT CIRCUMSTANCES IN AN EFFORT TO LOCATE AND POSSIBLY SAVE THE LIFE OF A VICTIM OF ROBBERY AND ABDUCTION, LEAVE THE DWELLING FOR A SHORT TIME, LOCATE THE DEAD VICTIM, CAN THEY RE-ENTER THE DWELLING TO SEIZE ITEMS RELATED TO THE CRIME THEY HAD OBSERVED IN PLAIN-VIEW ON THEIR INITIAL ENTRY WITHOUT EXTENDING THE SEARCH FURTHER.

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondents, State of Mississippi, respectfully prays that the petition for writ of certiorari to the Supreme Court of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Willie Albert Smith v. State of Mississippi, 419 So.2d 563 (Miss.1982). The original opinion was modified and rehearing was denied on September 22, 1982. A copy of the opinion is before this Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Petitioner, Willie Albert Smith, was indicted for the crime of capital murder by the Grand Jury for the First Judicial District of Hinds County, Mississippi during the March 1981 Term. The indictment grew out of the March 15, 1981 abduction, robbery and murder of Shirley Roberts.

Petitioner was tried on the indictment beginning on July 27, 1981. Petitioner's bifurcated trial was conducted under the procedures mandated in Section 99-19-101 to 107, Miss. Code Ann. (Supp.1977) and the Mississippi Supreme Court in Jackson v. State, 337 So.2d 1242 (Miss.1976). At the conclusion of the guilt phase of the two stage trial, the jury after proper instructions, retired to consider their verdict. After deliberation the jury returned a verdict of guilty of capital murder. The trial then proceeded into the punishment or sentencing phase. After hearing additional evidence and being properly instructed the jury again retired, this time to consider sentence. The jury returned a sentence of death in proper form finding the existence of three aggravating circumstances.

An automatic review by the Mississippi Supreme Court of the conviction and sentence of death was affirmed by a unanimous court on August 11, 1982. Smith v. State, 419 So.2d 563 (Miss. 1982). A petition for rehearing was filed by petitioner and on September 22, 1982 the court modified its opinion and denied rehearing.

Included in the petition for rehearing was a motion for stay of execution pending the filing and disposition of a petition for writ of certiorari in the event the rehearing was denied. This motion was denied for reason of non-compliance with Rule 45, Miss. Sup.Ct. Rules. Application for stay of the September 29, 1982 execution date was then made to this Court. This motion was granted on September 27, 1982 pending the timely filing of the petition. Which was not done.

The facts, as reflected in the record, show that Shirley Roberts arrived at the Tote-Sum Store No. 6 where she was manager about 5:15 a.m. on March 15, 1981 to open the store. Two people, Kenneth Thomas and James Wells, in a passing car saw petitioner grab Mrs. Roberts who struggled with him. The two men, not wanting to get involved, drove on. They had a change of heart and returned to the scene a few minutes later there finding Jackson Police Department Officer, G.E. Otis present. They told Otis what they had seen only moments earlier. Officer Otis conducted a brief search of the parking area and found: a set of car keys, brass knuckles, a twenty-dollar bill, a woman's tennis shoe and a pair of eyeglasses. Thomas testified that Mrs. Roberts was unlocking the store when she was grabbed.

Officer Otis determined that one of the cars in the parking lot belonged to Mrs. Roberts and that she was no where on the premises. Otis then saw a red Pinto approach the Tote-Sum Store, make a u-turn and leave the scene. The Pinto fit the description of the suspect's car given by Thomas and Wells. Otis pursued and stopped the vehicle which was being driven by petitioner. Otis saw petitioner put something under the right front seat while in the process of stopping the petitioner. Petitioner got out of the car and began acting in a beliigerent way. Upon investigation Otis discovered it was the mate to the shoe found in the parking lot. There was mud and blood on petitioner's hands. Upon this information petitioner was arrested.

The petitioner told Otis he borrowed the red Pinto from Edward Charles McDonald and directed Otis and Officer Grice, who had arrived on the scene, to McDonald's address. McDonald then took the officers to petitioner's house.

Officer Grice joined by an Officer Roebuck entered petitioner's house in search of Mrs. Roberts. They observed several articles including women's clothing but did not stop to seize them in their frantic search for Mrs. Roberts. They exited the house and begin searching outside. They find and follow a "drag trail" from the house to a wooded area where they came to a ditch of water covered with leaves. A human foot is protruding from the water. The body of Mrs. Roberts is recovered. The police return to the house and seize those items they had observed on the initial entry into the house. Photographs were also taken at this time.

REASONS FOR DENYING THE WRIT

Petitioner blatantly ignored the order of this Court to timely file his petition for writ of certiorari. He filed it a month late. The failure to obey the order of this Court is grounds for dismissal of the petition without more.

If the Court decides to consider the petition there is no merit as petitioner attempts to raise two issues that were never presented to the court below and only one issue that was fully litigated below. He freely admits that he has not raised the two questions presented here dealing with the effectiveness of counsel in the section of his petition entitled "How The Federal Quesions Were Raised And Presented Below." (Petition at 7) This being the case this Ccurt has no jurisdiction to decide those issues. Those issues properly raised and decided below present no questions of substance as they involve no denial of rights guaranteed by the Constitution of the United States, Amendment Four.

A.

Preliminary to addressing the merits of this petition the respondents would contend that this Court has no jurisdiction to hear this petition as petitioner failed to follow the direct order of this Court by filing his petition for writ of certiorari a month late.

On August 11, 1982 the Mississippi Supreme Court affirmed the conviction and death sentence imposed on petitioner. September 29, 1982 was fixed as the date of execution of the sentence. On August 26, 1982 petitioner filed a petition for rehearing and application for stay of execution pending the filing of a petition for writ of certiorari with this Court. The application for stay was to be effective if rehearing was denied. On September 22, 1982 the original opinion of the court was modified,

the petition for rehearing was denied and the stay of execution was denied as there was no compliance with Rule 48, Miss. Sup. Ct. Rules. [There was no showing that a petition for writ of certiorari had been filed with this Court.]

Petitioner immediately applied to this Court for a stay of execution pending the filing and disposition of a petition for writ of certiorari. Justice White granted the stay on September 27, 1982. The order read:

> UPON CONSIDERATION of the application of counsel for the petitioner,
>
> IT IS ORDERED that the execution and enforcement of the sentence of death imposed upon the petitioner and scheduled for September 29, 1982, be, and the same is hereby, stayed pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

(Emphasis added)

With the final order being entered on September 22, 1982 petitioner's filing date was November 21, 1982. Rule 20, Rules of the Supreme Court of the United States. Petitioner requested no extension of time. He filed his petition on December 20, 1982. Therefore, the petition here presented was not timely filed in direct contravention of the order of this Court. In compliance with Rule 22.3, Rules S.Ct. U.S., respondent now objects to the jurisdiction of this Court to consider this petition as it was not timely filed in direct contravention of the order of this Court.

B.

Petitioner raises, for the first time, the allegation that he was denied effective assistance of counsel. This issue was presented to the court below for determination. Under the

rational of Cardinale v. Louisiana, 394 U. S. 437 (1969), this Court lacks jurisdiction to decide this issue as it was never presented to the State courts.

Petitioner attempts to rely on an off-hand comment in the opinion of the court below as a determination on the merits of this never raised claim. In the concluding paragraph of the opinion the court below stated:

> At the trial the defendant was ably defended by astute counsel retained by his family.
>
> 419 So.2d at 574.

This gratuitous comment by the court in no way determined the issue of trial counsel's competence. There was nothing for the court to determine as there was no claim of ineffectiveness before the court.

The only substantive claim petitioner makes deals with an offer by counsel to allow his law student son to do part of the closing argument. This did not occur so there can be no ground for complaint.

C.

Petitioner's second question deals with the test used in Mississippi to determine adequacy of counsel. As above this was not presented to the State courts and is barred from consideration here. However, he makes the incorrect claim that the "farce and mockery test" is maintained in this jurisdiction as the test for competency. The age of the authority he relies upon shows the reason for his mistaken viewpoint. In Stewart v. State, 229 So.2d 53 (Miss.1969), the Mississippi Court adopted the test set forth in MacKenna v. Ellis, 280 F.2d 592 (5th Cir.1960), that being "counsel reasonably likely to render and rendering reasonably effective assistance in the case of appointed counsel.

The Mississippi court also has used an "offensive to the common and fundamental ideas of fairness and right" test. Edwards v. State, 413 So.2d 1007 (Miss.1977); Hutchinson v. State, 391 So.2d 637 (Miss.1980). The "mockery of justice" test was also used at one time in dealing with retained counsel. Parham v. State, 229 So.2d 582 (Miss.1969). However, the question has now been fully answered by the court below. In Samuel Callahan, et al v. State of Mississippi, Miss. Sup. Ct. Misc. No. 1445 (decided February 16, 1983), not yet reported),[1] the Court stated:

> In Mackenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), the federal court employed for the first time the test of "counsel reasonably likely to render and rendering reasonably effective assistance." Id. at 599. This test is now used regardless of whether counsel is appointed or retained. Cuyler v. Stullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).
>
> Slip opinion at 6.

The court then goes on to apply this test to a retained counsel situation. Petitioner has selectively presented Mississippi law and done so incorrectly. This Court has no jurisdiction to hear this admittedly meritless claim.

D.

The only issue presented below and properly before this Court in this petition for writ of certiorari is the question concerning the search of appellant's house. This issue presents no substantial federal question that would justify the court invoking its discretionary jurisdiction by granting certiorari.

Petitioner does not challenge the initial entry and cursory search of his apartment conducted pursuant to the existence of circumstances recognized as constituting an emergency exception to the warrant requirement of the Fourth Amendment. His

complaint here is the second entry and seizure of items relating to the crime that were observed in plain view during the initial entry. The second entry was made after the termination of the emergency. Petitioner relies on Mincey v. Arizona, 437 U.S. 385 (1977) as a basis for his claim of constitutional violation.

The factual context of the search and seizure are of greatest importance in this case. The case at bar is clearly distinguishable from the factual setting in Mincey, supra. as is pointed out by the court below. We do not have a four day rug ripping search here. The court below did an exhaustive review of the facts and the law concerning the original entry, the re-entry and the seizure of the items observed in plain view upon the first entry.

A brief review of the facts of the case at bar and the law in such cases should be sufficient to convince the Court of the lack of merit in petitioner's argument.

Sergeant J. E. Otis stopped the automobile driven by appellant at approximately 6:15 a.m. on March 15, 1981. (R. 135) Both the vehicle and its driver met those descriptions of each which had been given the officer by the witnesses to the struggle between the victim and her abductor. (R. 132-133, 670-671). Observing the apparent mate to the victim's shoe partially protruding from beneath the passenger's seat (R. 138, 637), the appellant was placed under arrest at approximately 6:20 a.m. (R. 154) In the process of arresting appellant, Sergeant Otis further observed mud on appellant's fingers and what appeared to be blood on the palms of his hands. (R. 138, 677) Informed that he was under arrest for kidnapping and possible robbery, appellant directed the officers to the home of Charles McDonald, the owner of the automobile. (R. 726) Accompanied by Officers Terry Grice, Steve Roebuck and James Howard, they

arrived at McDonald's residence at approximately 6:30 and remained there for about ten minutes. (R. 170-171) Riding with Officer Howard, Charles McDonald directed the officers to appellant's residence at 109 Keystone Court (R. 794), where they arrived at approximately 6:45 a.m. (R. 171) Keystone Court was actually a small alleyway and was blocked by parked cars. It was therefore necessary for the police vehicles to park on Henley Street a short distance from appellant's residence. (R. 145) Accompanying Officer Grice, Roebuck and Howard, McDonald indicated the apartment where appellant lived. (R. 172) Officer Grice and Roebuck were the first to enter the dwelling. (R. 182) The purpose of such entry not to obtain evidence but to locate the victim, Mrs. Shirley Roberts. (R. 181) Officer Howard also entered the apartment. (R. 814) Mr. McDonald followed the officers into the house. (R. 582) Entering by way of the front porch--there being no door but merely an open doorframe--they walked down what appeared to be a common hallway. (R. 187) The second door on the left was open and those items which were observed by the officers and subsequently recovered were visible and in plain view from the hallway. (R. 176, 187) A white sweater, a brown canvas purse, a wallet and a pair of light brown or khaki pants were laying on the bed. A pair of men's shoes were on the floor beside the bed, a pair of dark brown pants were also on the floor, as was a padlock with a key in it. (R. 174-175, 181, 796-802) The officers entered the room and continued to look for the victim. (R. 173) They did not conduct a detailed search of the residence nor did they stop to collect any evidence. (R. 174) They did not open drawers or disturb anything but just looked anywhere the victim could have possibly been found, such as under the bed or in the closet. (R. 176)

Noting that the mud upon the men's shoes appeared to be still fresh, Officer Grice went outside and around the house were he observed fresh footprints leading towards the woods behind the house. He was then joined by Officer Roebuck and walked in that direction looking for the victim. (R. 173) Not far from the rear of the house, a trail which appeared to have been made by something having dragged along the ground began. (R. 173) Following this trial to a water-filled ditch 40 to 50 yards away, they found the body of the victim. (R. 174) The time was approximately 7:12 a.m. (R. 813) After discovery of the body Officer Grice informed the Mobile Crime Lab of those items which had been seen in the apartment. (R. 185, 829)

During the initial entry the officers had been in the apartment for about four minutes. (R. 827) Mr. McDonald had been told to come out of the apartment and remained outside with one officer while the others followed the trail into the woods. (R. 855) He estimated that they had been in the apartment about five minutes and that the officers found the body ten minutes after they went outside. (R. 856)

Officer Walter Welch, an evidence technician with the Mobile Crime Lab, arrived at the appellant's apartment at approximately 7:20 a.m. (R. 189) Entering the apartment, he photographed the objects as situated when found prior to his removal of the same. (R. 917, 925, 954) Detectives Patton, Fondren, and Adams were already in the apartment when Officer Welch arrived and pointed out to him the items which he recovered therefrom. (R. 194)

Those items seized by Officer Welch were as follows:

(1) One white sweater (State's Exhibit 17; R. 918);

(2) One pair of light brown or khaki pants (State's Exhibit 21; R. 924);

(3) One pair of men's shoes (State's Exhibit 19; R. 927);

(4) One padlock with key (State's Exhibit 18, R. 920);

(5) One brown canvas purse containing the Social Security Card of Shirley L. Roberts and the Master Charge Card for Charles S. Roberts (State's Exhibit 16; R. 921);

(6) One wallet (State's Exhibit 22; R. 925);

(7) One pair of dark brown pants (State's Exhibit 20; R. 922);

(8) One $100 bill as recovered from the aforesaid khaki pants (State's Exhibit 39; R. 930); and

(9) Bedsheets and brown flowered shirt (State's Exhibit 47; R. 1008-1009).

Although the court below, of necessity, considered the legality of the initial entry it was not an issue below nor is it questioned here. The only issue being the re-entry and seizure of the above listed items.

After finding the initial intrusion into the apartment was justified the court below correctly came to the following conclusions concerning the re-entry and seizure. The Court stated:

> Consideration of the search of the defendant's apartment and the subsequent seizure of the articles in question does not stop with the justification for the initial entry and a discussion of whether a seizure of the incriminating objects at that time would have been lawful. Officers Grice and Roebuck left the house after satisfying themselves that Mrs. Roberts was not in the house. They then proceeded to search the area immediately surrounding the house where they discovered Mrs. Roberts' body. Defense counsel contends that at this point the exigent circumstance lapsed and any subsequent re-entry into the house required a warrant. A proper analysis of

Coolidge and the underlying basis for the justification of "plain view" seizures reveals the fallacy in this contention. What if the police, upon their lawful entry into the defendant's apartment, and after seeing the various articles of clothing, etc. lying in plain view upon the bed and the floor, and recognizing them for their evidentiary value, had stopped to gather them up, log their positions in the room, and otherwise insure that their evidentiary value was preserved? Such actions on the part of the police officers might have cast grave and possibly fatal doubts upon the validity of the exigent circumstances justifying their initial entry. See Root v. Gauper, 438 F.2d 361 (8th Cir. 1971). A careful analysis of the actions of the officers upon reaching the scene of the "emergency" is vital to insure that the emergency doctrine exception to the requirement of a warrant does not escape its bounds and engulf the general rule. In the instant case, any actions on the part of the police officers other than those which clearly reflected their belief that Mrs. Roberts was in the vicinity, either in the house or immediately outside it, would have tended to cast doubts upon the validity of their search.

Viewed from this perspective, the conundrum of the emergency doctrine exception becomes apparent. If the officers stopped to seize the evidence in plain view, their initial search is invalidated since their actions would not have been consistent with the existence of an emergency. If they continue to search for the victim, so that the object is no longer in plain view, they may not return and seize the incriminating objects without first obtaining a search warrant. The solution to this dilemma must follow one's viewing the totality of the circumstances surrounding the initial entry, the officers of the Jackson Police Department were engaged in only one search. That search had only one goal; locating Mrs. Roberts (and assisting her, if not too late). The actions of Officer Welch and the other members of the mobile crime lab (after the re-entry of the apartment) were merely to effectuate the physical seizure of articles in plain view which Officers Grice and Roebuck would have been able to seize had not the circumstances been so "exigent". There was no unwarranted delay in time, nor was there any expansion of the scope of the search. The fact that the actual physical taking of the items into the custody of the police was effectuated by evidence technician who was trained to preserve the evidentiary value of the objects, rather than by the first officers to view the objects, is not significant.

The state cites the case of La Fournier v. State, 91 Wis.2d 61, 280 N.W.2d 746 (1979), which dealt with the validity of a warrantless rearch and seizure of evidence following an initial entry into the defendant's place of residence. In that case, the first officer who entered the residence did so without a warrant under the "emergency rule." He observed "plain view" incriminating evidence and called for assistance much as happended in the instant case. He called for other officers to "secure the scene" and left. Three other officers came within about fifteen minutes and entered the defendant's premises. Evidence seized during this alleged "second entry" was sought to be suppressed. The Wisconsin Supreme Court upheld the last entry and seizure of evidence, and stated:

> The three officers did not more than Weiland would have been justified in doing had he remained on the premises. They entered the same area of the house in which Weiland had found the drug victim and in which the contraband was discovered in plain view. These officers were called as backup; they were completing that which was lawful under the first entry, securing evidence in plain view. They did not expand the scope or nature of the original entry. Their purpose was limited to the evidence Weiland had found in plain view. That evidence and La Fournier's statement that he had just shot up provided the officers with probable cause for La Fournier's arrest and the custodial search which brought to light the heroin.
>
> Whether a subsequent entry is detached from an initial exigency and warrantless entry or is a continuation of the lawful initial entry can be determined only in light of the facts and circumstances of each case. We conclude that in the instant case the successive intrusions of Weiland and the three officers were close in time and practically identical in nature so as to be analytically and factually inseparable. The entry of the three officers must be regarded as a continuation of Weiland's initial legal entry. No warrant was needed.

Id. at 69-70, 280 N.W.2d at 750-51.

(Footnotes omitted) 419 So.2d 571-573.

The Court went on to discuss the case of Norman v. State, 302 So.2d 254 (Miss.1974), where a warrantless search incident to arrest was interrupted by the discovery of a bomb in the house. The state court concluded stating:

> In the instant case, the justification for the initial search differs from Norman, (emergency circumstances versus a search incident to an arrest), but in both situations the officers' presence within the dwelling had a prior legal justification. The original search in the present case was not completed due to the overriding importance of first locating Mrs. Roberts. After the officers first exited defendant Smith's apartment, Jackson police officers continually maintained the status quo around the residence. There was no unreasonable lapse of time between the initial viewing of the incriminating objects and the subsequent physical seizure. Finally, the entry of the house by the members of the mobile crime lab merely constituted a continuation of the original search. The only objects seized were those in plain view (or contained iwthin them) and the only room searched was the one room in which they were seen.
>
> Accordingly, we conclude that the original entry of Officers Grice and Roebuck appears justified under the emergency doctrine exception to the requirement of a warrant for the entry and search of a dwelling. Once in Smith's apartment, they were authorized to seize incriminating objects coming into plain view. The fact that they did not do so at the time is merely evidence of the exigency of the particular circumstances. The second entry into Smith's apartment by members of the mobile crime lab constituted a continuation of the original search. Therefore, the decision of the trial court to overrule the appellant's motion to suppress those items of evidence recovered as a result of the search of Smith's apartment was not error.
>
> (Emphasis added) 419 So.2d at 573-574.

It is clear from the facts in this case that the police entered legally under the exigent circumstance of attempting to preserve life. The officers could see into the bedroom searched from the common hall as the door to petitioner's apartment was open. The police entered the room looked in closets and under the bed. While searching for Mrs. Roberts they observed the items later seized in plain view. The officers left the apartment, still in search of Mrs. Roberts, telling McDonald [the person who led the police to the apartment] to wait outside with an officer. This precaution was certainly taken to preserve the

scene of a possible murder. The police were in the apartment for four to five minutes. The search for Mrs. Roberts continued outside the house and her body was found some twenty-two minutes later forty to fifty yards from the apartment partially submerged in a water filled ditch. Some eight minutes later the mobile crime lab arrived and entered the apartment the second time. They photographed the bedroom and seized those items observed in plain view by the first officers. They opened no drawers, tore up no carpet, removed no item that was not noted by the officers on their initial entry and they completed this operation within thirty-five minutes. This was not the "exhaustive and intrusive" four day search condemned in Mincey, supra.

The holding of the Mississippi Supreme Court is fully supported by the holdings in Michigan v. Tyler, 436 U.S. 499 (1978), Satchell v. Cardwell, 653 F.2d 400 (9th Cir. 1981); cert. den. ___ U.S. ___, 102 S.Ct. 412, 71 L.Ed. 311 (1982); United States v. Brand, 556 F.2d 1312 (5th Cir. 1977), reh. den, 561 F.2d 831, cert. den. 434 U.S. 1063 (1978); Wooten v. State, 398 So.2d 963 (Fla.1981); Commonwealth v. Young, 377 Mass. 688, 416 N.E. 2d 944 (1981); State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980), cert. denied. 449 U.S. 938 (1981); LaFournier v. State, 91 Wis. 2d 61, 280 N.W.2d 746 (1979); State v. Martin, 274 N.W. 2d 893 (S.D. 1979), cert. den. 444 U.S. 882 (1979); Crum v. State, 349 So.2d 1059 (Miss.1977); Voss v. State, 198 Tenn 135, 278 S.W. 2d 2d 667 (1955), cert. den. 348 U.S. 965 (1955).

The court below correctly held that the subsequent entry and limited seizure comported with the constitutional gurantees of the Fourth Amendment. Petitioner has presented no argument sufficient to show that this Court should grant certiorari on this question.

CONCLUSION

For the reasons stated above the Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi should be denied.

Respectfully submitted,

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CERTIFICATE

I, Marvin L. White, Jr., Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari to David M. Cowin, Esquire, 140 Henry Street, Brooklyn, New York 11201.

This, the 18th day of February, A.D., 1983.

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SPECIAL ASSISTANT ATTORNEY GENERAL